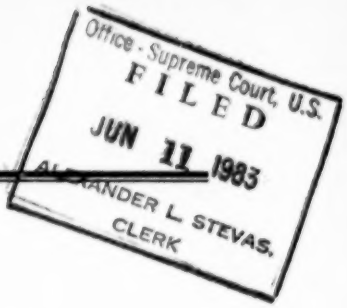

NO. 82-1792

In The

Supreme Court of the United States

OCTOBER TERM 1982

DALLAS COUNTY, TEXAS,

Petitioner

v.

DONALD WILLIAMS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF IN REPLY TO RESPONDENT DONALD WILLIAM'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER
DALLAS COUNTY, TEXAS

June 10, 1983

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ARGUMENT

1. REPLY TO ARGUMENTS RAISED UNDER POINT "A" OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. (Germane to question number I. in Petition for Certiorari)

The cases cited by Respondent under Section A of his argument are inapposite, because Respondent fails to make the distinction between a party prevailing *solely* on a pendent state tort claim while *failing* to prevail on his Section 1983 claim, as in the case at bar; and a party prevailing on his pendent, dispositive state tort claim when the court

avoided a determination of his § 1983 claim, as in *Maher vs. Gagne*, 448 U.S. 122 (1980), because such a determination was not necessary to dispose of the case.

As the legislative history of the Attorney Fee Act (42 U.S.C. §1988) makes clear, attorney fees may be awarded when a court finds for a plaintiff on a dispositive pendent claim while *refraining* from the constitutional question. H. R. Rep. No. 94-1558, p. 4, n. 7 (1976), Brief in opposition, page 10.

In the case at bar, the District Court carefully distinguished the situation discussed in the legislative history from the one presently before it, since a determination of the constitutional question was not avoided by the District Court. See Petitioner's Appendix B-21. Rather, the jury found the Plaintiff suffered no damages as a result of his constitutional claim, and that Defendant Bolt acted in good faith.[1]

The jury finding of "excessive force" against Bolt in this case is not a finding on which prevailing party status can be supported, since the jury went on to find that Respondent suffered no damages as a result of Bolt's use of excessive force. Petitioner's Appendix D-12.

Therefore, the facts before the Court in *Milwe vs. Cavuoto*, 653 F.2d 80 (2nd Cir. 1981) differ substantially from the facts in this case. In *Milwe* the jury found the Plaintiff was *injured* by the unconstitutional activity of Defendant and was thereby entitled to compensation, however nominal. This entitled Plaintiff to attorney fees since a *compensable* constitutional injury was found to exist. In the present case, Respondent suffered no compensable constitutional injury.

[1]The good faith defense was later withdrawn by the Court as a matter of law. Petitioner's Appendix B-19.

No injunctive relief was awarded. No declaratory relief was awarded. There is no basis on which to support a conclusion that Respondent prevailed on his constitutional claim. Therefore, he is left with nothing more than a small recovery on a state tort claim. In this suit for damages, Respondent asserted alternative theories of recovery: a Section 1983 claim and a pendent state law claim. He failed to recover on his constitutional theory, and recovery on the pendent claim, standing alone, is not sufficient to support an award under Section 1988. *Haywood vs. Ball*, 634 F.2d 740, 743 (4th Cir. 1980), *Luria Brothers and Company, Inc. vs. Allen*, 672 F.2d 347, 357 (3rd Cir. 1982).

2. REPLY TO ARGUMENTS RAISED UNDER POINT "B" OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. (Germane to question number II. in Petition for Certiorari.)

Respondent's reliance upon *Hutto vs. Finney*, 437 U.S. 678 (1978) is misplaced. In *Hutto vs. Finney*, the Commissioner of Corrections and members of the Arkansas Board of Corrections were sued for injunctive relief in their official capacities due to practices occurring in Arkansas prisons. In the present case, a deputy sheriff, sued individually for damages only, was the highest official who remained in the suit[2]. In *Hutto*, sweeping prison reforms monitored by the court's retaining jurisdiction for a period of time encompassing some nine years of supervision was the relief obtained by Plaintiffs. In the present case, Respondent was awarded

[2]Although Sheriff Thomas was sued, the District Court found, as a matter of law, "... Thomas cannot be held liable on a theory that a Sheriff is absolutely responsible for all acts of his deputies as urged by Williams." Petitioner's Appendix B-14.

$500.00 for an assault and battery claim against a single deputy sheriff. Petitioner's Appendix page D-14. In *Hutto*, the attorney fees award was predicated in part upon the Defendants' bad faith. In the present case, there was not only an explicit finding that no malicious conduct existed[3], but there was also an explicit finding that Bolt acted in good faith.[4]

Hutto involved a clearly prevailing party who was granted *injunctive* relief, while in the present case, Respondent failed to prevail on his constitutional claim for *damages*. Most importantly, the 11th Amendment argument made by Respondent in his Brief in Opposition, based in part on *Hutto*, cannot stand under the circumstances of the present case.

Hutto involved injunctive relief. The case presently before the Court was purely an award of damages on a state law claim. The Texas Torts Claims Act provides a method by which the state has chosen to selectively abrogate its sovereign immunity and allow specific tort claims to be filed against it and its agencies. However, the act provides in Section 14(10):

> EXEMPTIONS
>
> Sec. 14. The provisions of this Act shall *not* apply to:
>
> ... (10) Any claim arising out of assault, battery, false imprisonment, or any other intentional tort including, but not limited to, disciplinary action by school authorities.

Vernon's Texas Civil Statutes, art. 6252-19, Sec. 14(10) (emphasis added).

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[3]Petitioner's Appendix page D-12.

[4]Petitioner's Appendix page D-11. See further footnote 1.

It is undisputed that a state, its agencies and certain officials enjoy immunity from damages sought under Section 1983 due to the protection of the 11th Amendment. *Quern vs. Jordan*, 440 U.S. 332 (1979). Therefore, if Respondent had sued Deputy Bolt for damages in his official capacity, as he now claims, and if such suit was determined to be a suit against the county, which is an arm of the State of Texas, same would, therefore, be barred by the 11th Amendment. The suit for damages, if brought against these employees in their official capacities and against the governmental entity, would, therefore, be barred *ab initio* by the 11th Amendment. Since the suit would be barred, the County could not be liable for the damages awarded or for attorney fees in conjunction with that award, especially absent the imposition of injunctive or declaratory relief. The relief requested by Respondent could not be granted by the Court.

In Texas, counties are unique in structure and in relationship to the State. See *Doe vs. Sullivan*, 472 F.Supp. 975 (W.D. Tex. - 1979), holding that counties are arms of the State and as such are entitled to 11th Amendment immunity.

Under the present Texas Constitution of 1876, Article XI, Section 1, counties are described as "political subdivisions of the State". The explanatory comment to that section states:

> In Texas, a county is an *involuntary* political subdivision of the state, an agency or arm of state government created by the sovereign will for the purpose of discharging such governmental obligations of the state ... (emphasis added)

Texas Constitution Art. XI Section 1 (1876) 2 Vernon's Annot. Stat. (1955).

In 1884, the Supreme Court of Texas delineated the distinctions between counties and cities in Texas in the case of *City of Galveston vs. Posnainsky*, 62 Tex. 118, 126-7 (1884), stating:

> The one [the county] is created for a public purpose as an agency of the state, through which it can most conveniently and effectively discharge the duties which the state, as an organized government, assumes to every person, and by which it can best promote the welfare of all . . .

Justice Stayton in the *Posnainsky* case said of counties:

> Counties are created by the general law and while they are municipal corporations in a restricted sense, they are involuntarily so, and sustain to the state a relationship which a town or city incorporated does not sustain. They are created to carry out a policy common to the whole state, and not mainly to advance the interest of the particular locality and to bring advantage or emolument to the inhabitants of the municipality.

Id.

Federal courts have also realized the unique structure of Texas counties in regard to their relationship to the State. In *Crane vs. State of Texas*, 534 F.Supp. 1237, 1243 (N.D. Texas — 1982), Judge Higginbotham noted,

> Cities are created primarily for the benefit of their citizens while counties are primarily the "arms" or agents of the state. (cites omitted)

The Court went on to recognize that,

> . . . students of state government believe the state is moving toward even greater control over the county administration of certain state functions . . .

Id. at page 1245.

In *Crane*, it was held by the Court that the individual Defendants, while county employees, were not acting for the county qua county, but rather were meeting state created duties. Therefore, the county could not be held liable for their acts pursuant to *Monell vs. Department of Social Services*, 436 U.S. 658 (1978), under the facts of that case.

The Fifth Circuit has remanded a case involving the Harris County Treasurer to determine whether the counties of Texas, due to their unique qualities, should be afforded 11th Amendment immunity. *VanOoteghem vs. Gray*, 654 F.2d 304 (5th Cir. 1981) cert. den. 455 U.S. 909 (1982).

For these reasons, Dallas County, as an agency of the State of Texas, cannot be held liable herein due to its immunity under the 11th Amendment to the United States Constitution.

Respondent has misconstrued Petitioner's argument that Dallas County cannot be held liable under the clear teaching of *Monell vs. Department of Social Services of the City of New York, et al.*, 436 U.S. 658 (1978), absent a county policy or custom authorizing the behavior complained of, or the involvement of a person whose acts and edicts can fairly be said to represent county policy. Certainly the citation of *Collins vs. Thomas*, 649 F.2d 1203 (5th Cir. 1981) cert. den. ..... U.S. ....., 102 S.Ct. 1992 (1982) is inapposite, since in that case Sheriff Thomas was the party against whom relief was fashioned. Here, there is only a deputy sheriff involved, and it cannot be seriously argued that his acts or edicts may fairly be said to represent county policy, nor was it ever argued that the county maintained a policy or custom that resulted in the injuries complained of by

Respondent. Therefore, no liability can be imputed to Dallas County, either for the damages or attorney fees awarded.

Respondent has argued that although the County was not named in the suit, it was represented below at all times by the District Attorney. The presence of the District Attorney in the suit does not mean that the county was represented. Under Texas law, the District Attorney is not required to represent the county in a lawsuit. Rather the District Attorney is required by law to represent County *employees* or *officials*, if the suit involves any act of the employee or official in performance of public duties. Art. 332 C, Tex. Rev. Civ. Stat.

The District Attorney *may* advise the county, if *requested*, and no such request was made in the present case. This authorization is found in Art. 334, Tex. Rev. Civ. Stat.

Certainly, the District Attorney vigorously represented the individual deputies named herein. Until the United States Court of Appeals for the Fifth Circuit entered its erroneous opinion in this case, there was no necessity for representation of the County since it had not been named a party and since no individual Defendant was sued in his official capacity.

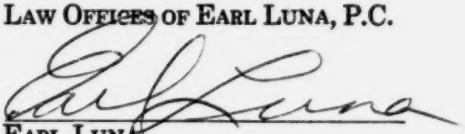
CONCLUSION

Requiring a county not sued below to pay damages and/or attorney fees awarded solely on a state tort law claim against a deputy sheriff sued individually creates a hazardous, unwarranted expansion of 42 U.S.C. §1983, and 42 U.S.C. §1988, and conflicts with this Court's decisions in *Hanrahan vs. Hampton*, 446 U.S. 754 (1980) and *Monell vs. Department of Social Services of New York*, 436 U.S. 658 (1978).

Therefore, Dallas County's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted and the finding of liability against Dallas County should be reversed.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



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DALLAS COUNTY, TEXAS

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been retained as attorney of record for Petitioner Dallas County.

I further state upon oath that upon the 10th day of June, 1983, I served copies of the foregoing Petitioner's Brief in Reply to Respondent Donald William's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondent by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated to-wit: Ms. Sue LaGarde, Assistant District Attorney, Ninth Floor, County Courthouse, Dallas, Texas 75202, and Mr. Robert T. Mowrey and Mr. Mitch Bell, of Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201.

Earl Luna

EARL LUNA

SUBSCRIBED and SWORN TO before me by the said Earl Luna, this the 10th day of June, 1983.

Betty Jarratt

Notary Public
for Dallas County, Texas